

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**STEVEN M. CONROW**

## Claimant

VS.

**GLOBE ENGINEERING COMPANY, INC.**

Respondent

AND

**FEDERATED MUTUAL INSURANCE COMPANY**

Insurance Carrier

Docket No. 1,026,353

## ORDER

Respondent and its insurance carrier appealed the September 10, 2008, Review & Modification Award entered by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on December 19, 2008, in Wichita, Kansas.

## APPEARANCES

John L. Carmichael of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

## RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Review & Modification Award.

## ISSUES

Claimant injured his upper extremities working for respondent through November 11, 2005. This claim was initially decided by Judge Clark in a June 21, 2007, Award. That Award granted claimant permanent disability benefits under the schedule of K.S.A. 44-510d for the following four functional impairments: (1) 10 percent to the left forearm for carpal tunnel syndrome; (2) 10 percent to the left arm for ulnar nerve entrapment; (3) 10 percent to the right forearm for carpal tunnel syndrome, and (4) 10 percent to the right arm for ulnar nerve entrapment. The parties then appealed to the Board, which affirmed the Award in its November 16, 2007, Order. On December 14, 2007, respondent and its

insurance carrier appealed the Board's Order to the Kansas Court of Appeals, which has scheduled oral argument for February 10, 2009.

On December 19, 2007, claimant filed with the Division of Workers Compensation an application for review and modification of the June 21, 2007, Award and the Board's November 16, 2007, Order. In that application, claimant alleged that the award was inadequate as he was now permanently and totally disabled. Judge Clark agreed. In the September 10, 2008, Review & Modification Award the Judge modified claimant's award and granted him permanent total disability benefits effective June 22, 2007. The Judge reasoned, in part:

Dr. Melhorn and Dr. Chris Fevurly testified that the Claimant was employable. The Respondent's vocational rehabilitation expert, Mr. Zumalt also thought there was some kind of a job out there that the Claimant could do although he couldn't identify any in the Wichita area. It was the opinion of the Claimant's vocational rehabilitation expert, Jerry Hardin; and also, Dr. George Fluter, that the Claimant was not realistically employable.

Notwithstanding *[sic]* the opinions of all the experts, this case will be decided on the entirety of the Record and the facts, and the facts are clear.

The Claimant is limited to a high school education, with some on-the-job training. He worked for the same employer from 1981 until he was fired on November 11, 2005. He is receiving Social Security Disability Benefits, dated from the date he was terminated from the Respondent but testifies that he still wants to work and has applied for over 200 jobs since December of 2007, through the date of his deposition, which was June 11, 2008, and he has been unsuccessful. It is admirable that the Claimant still thinks that there is a job that he could do but he was unsuccessful in even securing employment as a "greeter" at six different Wal-Mart stores.

The facts are clear. The Claimant is realistically unemployable and therefore this Court finds that the Claimant is permanently and totally disabled.<sup>1</sup>

Respondent contends Judge Clark erred. Respondent maintains that claimant is capable of substantial and gainful employment, as evidenced by claimant's employment after his separation from respondent. In the alternative, if claimant is found to be incapable of substantial and gainful employment, respondent argues it is due to his longstanding, preexisting arthrogryposis and not the result of his work-related injuries.

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<sup>1</sup> ALJ Review & Modification Award (Sept. 10, 2008) at 4.

Claimant contends that the inability to use his hands resulting from the carpal tunnel syndrome has precluded his employment in the open labor market regardless of his congenital arthrogryposis. Claimant maintains there has been a change of circumstances from when this claim was initially litigated and argues, in part:

As explained above, Mr. Conrow's testimony, standing alone, should be sufficient to show a change of circumstance warranting review and modification, i.e. shortly prior to the expiration of the original terminal dates Mr. Conrow had been employed in an accommodated position, however, after having lost that job, through no fault of his own, Mr. Conrow has pursued an extensive job search and has been unable to locate any substantial gainful employment. Had Mr. Conrow asserted that he was permanently and totally disabled at the close of the evidence in the original award, such claim would no doubt have been met with the valid argument that Mr. Conrow had been recently employed and had not looked long and hard enough without success to establish a permanent and total disability. Now, with the passage of time, and an extensive job search, not to mention the determination of the Social Security Administration, it is apparent that Mr. Conrow is no longer employable in the open labor market.<sup>2</sup>

Accordingly, claimant requests the Board to find that he is permanently and totally disabled or, in the alternative, award benefits for an additional 3 percent functional impairment to the right upper extremity at the wrist, for an additional 12 percent functional impairment at the right shoulder, and for an additional 13 percent functional impairment at the left shoulder.

The issues before the Board on this appeal are whether there has been a change of circumstances since the claim was initially litigated to justify modifying the Board's November 16, 2007, Order and, if so, how should that Order be modified.

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

In short, claimant worked for respondent from the early 1980s until November 11, 2005, and developed bilateral carpal tunnel syndrome and bilateral ulnar nerve entrapment at the elbows. In April 2006, Dr. J. Mark Melhorn operated on both wrists and elbows.

By its November 16, 2007, Order this Board awarded claimant permanent disability benefits under the schedule of K.S.A. 44-510d for the following four functional

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<sup>2</sup> Claimant's Submission Letter at 9 (filed Aug. 22, 2008).

impairments: (1) 10 percent to the left forearm for carpal tunnel syndrome; (2) 10 percent to the left arm for ulnar nerve entrapment; (3) 10 percent to the right forearm for carpal tunnel syndrome, and (4) 10 percent to the right arm for ulnar nerve entrapment. An appeal of that award is now pending before the Kansas Court of Appeals, which has scheduled oral argument for February 10, 2009.

Claimant initiated this review and modification proceeding under K.S.A. 44-528 to request either an award of permanent total disability benefits or an award for increased functional impairment.

In the Board's November 16, 2007, Order, the Board determined claimant injured both wrists and elbows working for respondent. Moreover, the Board determined the presumption of permanent total disability had been rebutted because (1) claimant worked for another company after leaving respondent's employ, (2) no doctor restricted claimant in such manner to prevent him from working, (3) no vocational expert testified claimant was incapable of working, and (4) claimant did not request permanent total disability benefits.

At his May 2008 review and modification hearing claimant testified he now has less feeling and sensation in his hands and that his hands, arms, and shoulders are *probably* worse than when he testified before his initial award. Claimant also believes he has lost additional strength in his hands, which he attributes to his injuries at work rather than his arthrogryposis.<sup>3</sup> Moreover, claimant testified at his June 2008 deposition that his wife now helps him put on his socks and tie his shoestrings due to his inability to grip.

Claimant has not worked since leaving the employment of G&D Metals (where claimant worked after his employment with respondent ended) in September 2006. According to claimant he worked at G&D Metals for several weeks before undergoing upper extremity surgeries in April 2006. After recovering from his surgeries claimant returned to work for G&D until September 2006 when he was terminated. Claimant's testimony is uncontradicted he was continuing to have trouble with his hands despite his surgeries and G&D ran out of work that he could physically perform. In 2007 claimant began receiving Social Security disability benefits and now receives approximately \$2,190 per month.

Following his initial award, claimant conducted an intensive job search. Claimant, whose work experience is primarily limited to the aircraft industry, applied for more than 200 jobs between December 2007 and his May 2008 review and modification hearing. He

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<sup>3</sup> A congenital condition that is marked by chronic contractures and fixation of the joints, which may result in significant loss of range of motion and deformity in the upper and lower extremities. Although the condition primarily affects the extremity joints, it may also affect the spine.

also made more than 40 contacts with potential employers between the review and modification hearing and his June 2008 deposition, when he last testified in this claim. Despite his job search, which has been primarily directed to the aircraft industry, claimant has been unable to find employment. Claimant has also applied at several call centers and for a greeter position at several Wal-Mart stores.

Respondent had claimant evaluated by Dr. Chris D. Fevurly and Dr. J. Mark Melhorn, both of whom evaluated claimant and testified for purposes of the initial award. Dr. Fevurly is board-certified in preventive medicine, internal medicine and as an independent medical examiner. Dr. Fevurly examined claimant in April 2008 and concluded any worsening in claimant's condition stemmed from his arthrogryposis. The doctor noted, in part:

Mr. Conrow has marked pre-existing limitations in his upper extremities and lower extremities as a result of the congenital arthrogryposis. The fact that Mr. Conrow has discontinued use of his hands over the last three years will lead to further atrophy of any existing muscles that may have previously existed before he left work. A review of the medical literature on arthrogryposis outlines contractures at the joints accompanied by muscle weakness as part and parcel of the condition. If he stops using the hands this will lead to further atrophy and weakness accompanied by further loss of range of motion in the joints. When a joint does not move for a period of time, extra connective tissue tends to grow around it leading to further loss of function in the joint. Lack of joint movement also means that tendons connecting to the joints are not stretched to their normal lengths; short tendons, in turn, make normal joint movement difficult. There is no evidence that there has been permanent denervation as a result of prior nerve entrapment. There is no evidence for current nerve entrapment at the cubital or carpal tunnel following the successful surgeries.

His limitations are predominantly (and likely exclusively) the result of his pre-existing congenital condition. The peripheral nerve entrapments have been surgically corrected and there are no new limitations as a result of the prior nerve entrapments as compared to the limitations from the pre-existing congenital condition. Were it not for the congenital condition, the successful surgical release of the carpal and cubital [*sic*] tunnel would have allowed him to return to full and unrestricted duty which is the usual result in the management of cubital and carpal tunnel syndrome.

He is capable of employment although it is obvious that it will need to be in a position that does not require fine motor skills with the hands or fingers. It will need to be a job that does not require the ability to perform forceful gripping with his

hands. He may be qualified for jobs such as a call center position or computer based position that does not require significant data entry.<sup>4</sup>

In short, Dr. Fevurly believes claimant's unemployment caused the weakness in his hands to worsen and the range of motion of his hands to worsen.<sup>5</sup> Moreover, the doctor believes claimant could engage in substantial and gainful employment as a supervisor in a machine shop if his job were limited to teaching or instructing rather than hands-on machine work. In addition, the doctor does not believe claimant could perform a job requiring much computer data entry or much handwriting.

Dr. Melhorn, who performed claimant's wrist and elbow surgeries in April 2006, examined claimant in early May 2008 at respondent's request for this review and modification proceeding. The doctor did not find any change with regard to claimant's nerve entrapment problems but the doctor thought claimant may have been a little stiffer from his arthrogryposis. In other words, Dr. Melhorn felt the limited range of motion in claimant's hands, elbows, and shoulders was due to his arthrogryposis. Moreover, the doctor opined that claimant's median and ulnar nerve entrapments did not prevent claimant from working. The doctor testified, in part:

My opinion is that this individual, based on his diagnosis of median and ulnar nerve entrapment and the treatment provided, is employable. I do believe that with his arthrogryposis, which is a naturally progressive disease process, that at some point in time he probably will not be able to perform regular work activities that would satisfy an employer.<sup>6</sup>

In short, Dr. Melhorn did not believe claimant's nerve entrapments in the upper extremities had changed since he had given claimant work restrictions in July 2006.

Dr. George G. Fluter, who is board-certified in physical medicine and rehabilitation, testified as claimant's medical expert witness. The doctor, who last examined claimant in March 2008, testified that claimant advised he was experiencing reduced grip strength in his upper extremities and that he now required help for certain activities of daily living, which he had not needed in the past. Moreover, claimant advised he was having hand and shoulder pain that was interfering with his sleep, wrist pain with reduced range of motion, and decreased sensation in his hands with numbness and tingling. In summary, claimant reported his symptoms were worse.

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<sup>4</sup> Fevurly Depo. (Aug. 1, 2008), Ex. 2 at 3.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> Melhorn Depo. (Aug. 7, 2008) at 17.

Dr. Fluter concluded that based upon the clinical information claimant's nerve entrapment had worsened as it was impeding claimant's ability to use his hands. The doctor believed such worsening was a natural progression of the injuries claimant sustained working for respondent. Moreover, Dr. Fluter testified claimant was not realistically employable:

Well, I think there's a couple of reasons. I mean, he, even though he had an underlying condition with the arthrogryposis, he had managed to compensate for that for a number of years. Obviously there are effects of the arthrogryposis at his elbows on other joints of the upper extremity, particularly the shoulders and wrists and hands, and over the course of time that -- that does take its toll in these chronic conditions. Also he's having symptoms related to -- to dysesthesias and paresthesias in the hands, which limits the sensory sensitivity of the hands and fingers when doing activities. It's impacted his ability to do even basic daily activities, such as dressing and bathing activities. The -- he's had problems with -- with grip, reduced grip strength in his hands, changes in range of motion of his fingers. So all of these issues would really make it difficult for him to really do much work with his upper extremities on a regular and consistent basis.<sup>7</sup>

Dr. Fluter thought the dysesthesias and paresthesias that claimant now experienced in his hands were attributable to the peripheral nerve entrapment rather than his arthrogryposis. Because of the nerve entrapment, the doctor believed claimant would have difficulty typing on a consistent basis, obtaining change from a change drawer, filing papers and documents, and performing any type of job that required grasping or gripping. In summary, Dr. Fluter believes claimant's nerve entrapment limits claimant's hand sensitivity, hand function, and strength.

Following the March 2008 examination, Dr. Fluter rated claimant's upper extremities based upon loss of range of motion. But the doctor admitted he did not know if claimant had actually lost any range of motion since the previous examination in July 2006 as the doctor did not attempt to measure claimant's range of motion at that time.

For purposes of this review and modification request, respondent also had vocational counselor Dan R. Zumalt interview claimant again. Mr. Zumalt concluded claimant had exceptional management and manufacturing skills and, therefore, he could work *if he found the proper fit*. Mr. Zumalt, who generally believes there is a job for everyone,<sup>8</sup> also felt claimant could perform the job of call-out operator or someone who works for a financial institution and handles incoming calls from customers. But Mr. Zumalt

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<sup>7</sup> Fluter Depo. (May 19, 2008) at 19, 20.

<sup>8</sup> Zumalt Depo. (June 18, 2008) at 59.

did not know of any job openings in the Wichita area for someone with claimant's restrictions, experience, and qualifications.

On the other hand, claimant presented the testimony of labor market expert Jerry D. Hardin. Based upon Dr. Fluter's opinion that claimant was essentially and realistically unemployable, Mr. Hardin likewise found claimant unemployable.

### CONCLUSIONS OF LAW

Claimant's testimony is credible that his hands are now more symptomatic than when this claim was first decided. The evidence establishes that claimant has lost additional sensation in his hands and that his hands are now less functional. In addition, the additional loss of strength in claimant's hands from atrophy is directly related to his work injury as his bilateral upper extremity injuries impeded him from working. In short, claimant has established a change of condition or circumstance that allows for modification of his award under K.S.A. 44-528.

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. **The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.**<sup>9</sup> (Emphasis added.)

Because claimant has sustained injury to both upper extremities, *Casco*<sup>10</sup> governs the analysis for calculating claimant's compensation and creates a presumption that claimant has sustained a permanent total disability.

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<sup>9</sup> K.S.A. 44-528.

<sup>10</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).



The analysis begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c. *Pruter*, 271 Kan. at 875-76.

If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability. See K.S.A. 44-510c(a)(2); *Pruter*, 271 Kan. at 875-76. Although both K.S.A. 44-510d and K.S.A. 44-510e apply to permanent partial disability, we note that eyes, hands, arms, feet, and legs are all included in the schedule. See K.S.A. 44-510d(a)(11)-(17). Because the legislature has made the schedule of injuries the general rule and permanent partial general disability the exception to the rule, the claimant's compensation must be calculated in accordance with the *[sic]* K.S.A. 44-510d for scheduled injuries. See, e.g., *Pruter*, 271 Kan. at 876.<sup>11</sup>

The Board concludes respondent has failed to rebut the presumption that claimant is now permanently and totally disabled after injuring both of his upper extremities working for respondent. Indeed, the greater weight of the evidence supports that presumption. For example, respondent employed claimant as a working supervisor and, unfortunately, claimant is no longer able to work with his hands. Likewise, claimant performed a rather extensive job search and was unable to find that special fit or special accommodated position, which respondent's vocational expert indicated would be required to return claimant to work. Considering claimant's injuries, education, and work experience, there is ample evidence that claimant is essentially and realistically unemployable.

In conclusion, the Board finds claimant is entitled to receive permanent total disability benefits and the Review & Modification Award should be affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>11</sup> *Id.* at 527, 528.

<sup>12</sup> K.S.A. 2007 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, the Board affirms the September 10, 2008, Review & Modification Award entered by Judge Clark.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant  
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge